

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

77-1263

77-1263

United States Court of Appeals
for the Second Circuit

United States of America,

Plaintiff-Appellee,

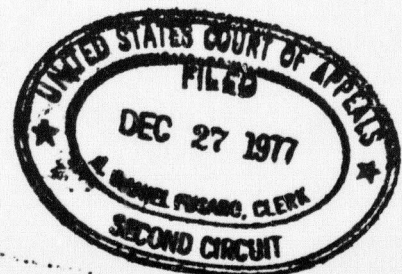
v.

Michael Yoder,

Defendant-Appellant.

Petition for Rehearing and Rehearing
En Banc for defendant-appellant
Michael Yoder

Mark J. Mahoney, Esq.
Doyle, Diebold, Bermingham,
Gorman, & Brown, Esqs.
1340 Statler Hilton Hotel
Buffalo, N.Y. 14202



In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

APPELLEE

-vs-

PETITION FOR REHEARING,
HEARING IN BANC

Cr. No. 77-1263

MICHAEL R. YODER,

APPELLANT

The Appellant above-named respectfully petitions this Honorable Court for a rehearing of the appeal in the above-entitled cause, and suggests a rehearing In Banc, Rules 35, 40 F.R.A.P., and in support of this petition represents to the Court as follows:

Counsel reserves arguments as previously briefed and argued, but addresses here two essential points which this Court, relying on the opinion of the trial court, erroneously and inexplicably overlooks:

I. The fact that Appellant was read "Miranda" warnings distinguishes this case of first impression from Oregon v. Mathiason, __ U.S. __, 97 Sup. Ct. 711 (1977).

The FBI agents, on November 11, 1976, deliberately told Appellant in effect "you have the right to counsel." The Trial Court and this Court now go back to that time and say "no you don't" -- without regard to any actions by Appellant taken in bona fides reliance on this and subsequent statements by his interrogators. No Court has done this before.

Law enforcement officers were trusted, by the United States Supreme Court, Miranda v. Arizona, 384 U.S. 486 (1966), with the dispensing of the rights enumerated therein. That is just what the FBI officers did in this case by reading the "Advice of Rights" form to the Appellant; this activated those rights for the Appellant just the same as if he had clearly been "in custody." No rational argument appears, and certainly not in the Trial Court's opinion or the Government's brief, against this conclusion.

II. To induce the Appellant to waive the rights he had, the FBI agents knowingly lied to him concerning when counsel could be supplied. The Government agrees that the Appellant was told that counsel could be supplied only when he was formally charged -- which the agents knew to be untrue. It also appears that Appellant was directly or, at least, indirectly advised that counsel could be supplied sooner if a confession was signed.

This Court now condones and therefore encourages the type of deception and manipulation demonstrated in this case.

This ruling does not affect those who desperately seek to avoid prosecution or conviction; they, unlike Appellant, would not surrender or cooperate with the FBI, and would, on questioning, assert the right to remain silent. The trial court ridicules the Appellant for not choosing this route.

Though Appellant desired to cooperate with the FBI, he did so only on the belief that he was being given the fullest

benefit of the rights he had asserted. This belief was mistaken, and it was created by the deliberate wrongdoing of the FBI agents involved; this enabled them to get a confession before arresting the Appellant at which time surely counsel would have been provided.

Does the ruling of this Court not now leave it open to law enforcement officers to use such deception on other suspects who are inclined to cooperate so long as they believe that they are being provided the rights they have asserted? Appellant believes so.

Since the U.S. Supreme Court in Miranda has encouraged the FBI practice of reading rights to unarrested suspects, 384 U.S. at 483-484, should this Court refuse to apply those rights or should the Court condone deliberate deception in eliciting waivers of the rights so read? Appellant believes not, and urges that the affirmance of the order denying the Appellant's motion to suppress overlooks the merits of Appellant's argument and the consequences of such an affirmance.

For the foregoing reasons the petition for a rehearing should be granted and the petitioner suggests a rehearing In Banc.

December 20, 1977

Mark J. Mahoney

MARK J. MAHONEY
Attorney for Appellant
DOYLE, DIEBOLD, BIRMINGHAM,
GORMAN & BROWN
Office & P. O. Address
1340 Statler Hilton Hotel
Buffalo, New York 14202

DOYLE, DIEBOLD, BERMINGHAM,
GORMAN & BROWN
ATTORNEYS AT LAW
1340 STATLER HILTON
BUFFALO, NEW YORK 14202
(716) 853 - 8190

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In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

APPELLEE

-vs-

AFFIDAVIT

MICHAEL R. YODER,

APPELLANT

STATE OF NEW YORK)
COUNTY OF ERIE) ss:
CITY OF BUFFALO)

DIANE M. MATUSZEWSKI, being duly sworn, deposes and
says:

I am not a party to the action, am over the age of
eighteen (18) years and reside in the City of Buffalo, County
of Erie and State of New York;

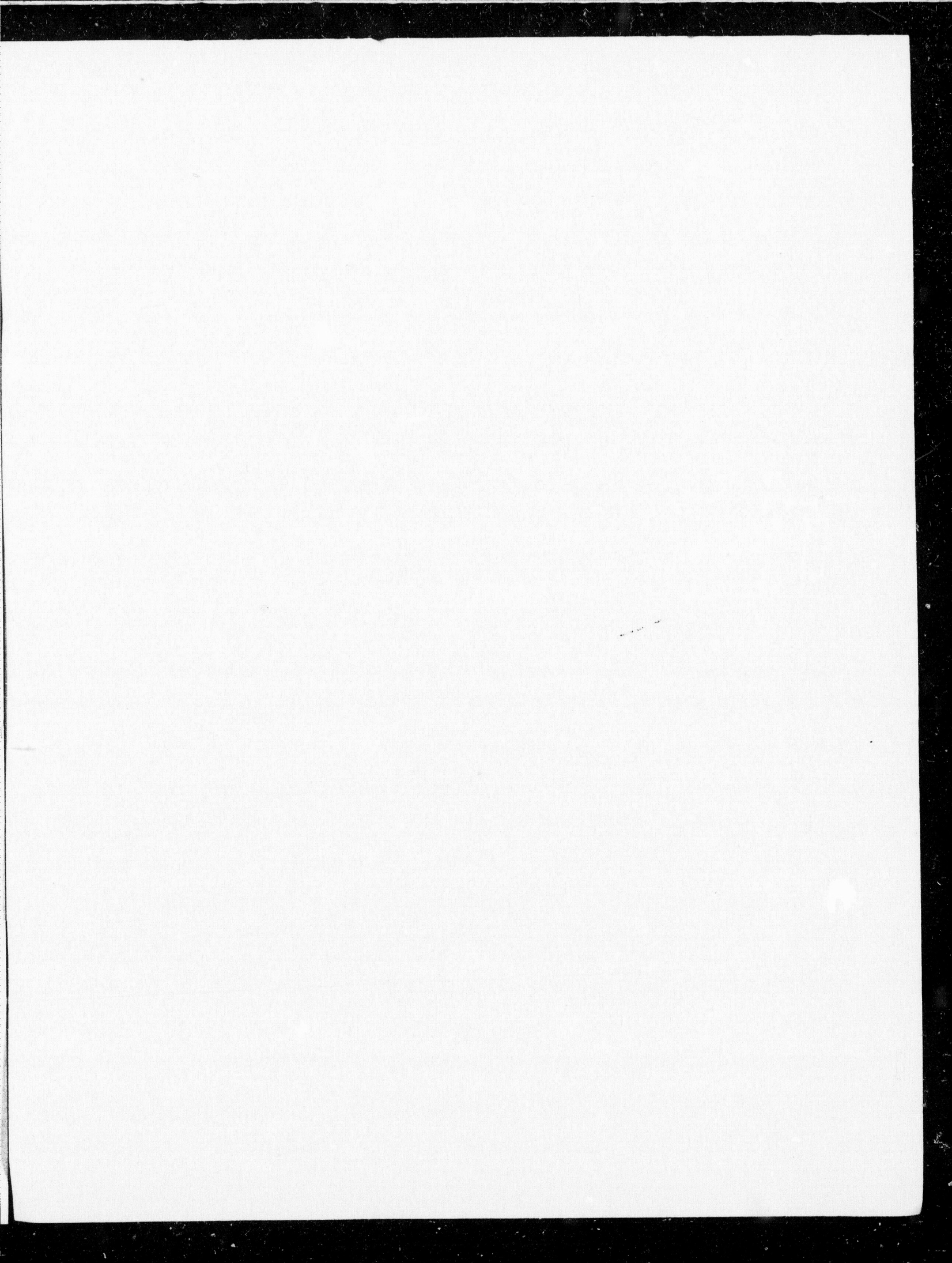
On December 20, 1977, I served a copy of the within
Petition for Rehearing, Hearing In Banc on EDWARD J. WAGNER,
Assistant U.S. Attorney, at the U.S. Courthouse, Buffalo, New
York 14202, the address designated by said attorney, by deposit-
ing said copy, enclosed in a post-paid, properly addressed
wrapper, in an official depository under the exclusive care and
custody of the United States Postal Service within the State of
New York.

Diane M. Matuszewski

Sworn to before me this

20th day of December, 1977.

M. Veronica Parry
M. VERONICA PARRY
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 22, 1981



STATE OF NEW YORK, COUNTY OF

SS.:

☐ Certification
by Attorney

The undersigned attorney certifies that the within
has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's
Affirmation

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is
the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein
stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent
further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF

SS.:

☐ Individual
Verification

he
in this action, that he read the foregoing
and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein
stated to be alleged on information and belief, and that as to those matters he believes it to be true.

☐ Corporate
Verification

being duly sworn, deposes and says that he is the
of
the corporation named in the within entitled action; that he has read the foregoing
and knows the contents thereof; and that the same is true to his own knowledge, except as to the matters therein
stated to be alleged upon information and belief, and as to those matters he believes it to be true.
Deponent further says that the reason this verification is made by deponent and not by
is because the said
is a corporation and the grounds of deponent's belief as to all matters in the said
not stated upon his own knowledge, are investigations which deponent has caused to be made concerning the subject
matter of this and information acquired by deponent
in the course of his duties as an officer of said
corporation and from the books and papers of said corporation.

Sworn to before me, this
day of

19

STATE OF NEW YORK, COUNTY OF

SS.:

☐ Affidavit
of Service
By Mail

is over 18 years of age and resides at

On 19

upon

attorney(s) for

being duly sworn, deposes and says, deponent is not a party to the action,

deponent served the within

in this action, at

the address, designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office—official
depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit
of Personal
Service

On 19 at
deponent served the within

upon

herein, by delivering a true copy thereof to him personally. Deponent knew the
person so served to be the person mentioned and described in said papers as the therein.

☐ Description

The person served would be described as approximately years of age lbs. ft. in.
male female hair skin eyes other

Sworn to before me, this
day of

19

Index No.

UNITED STATES OF AMERICA,

APPELLEE

Year

-VS-

AFFIDAVIT

MICHAEL R. YODER,

APPELLANT

DOYLE, DIEBOLD, BERMINGHAM, GORMAN & BROWN

Attorneys for

APPELLANT

Office and Post Office Address
1340 STATLER HILTON HOTEL
BUFFALO, NEW YORK 14202
Phone: (716) 853 - 8190

Personal Service of the within
hereon endorsed, is admitted this

day of

and of the notice (if any)

19

.....
Attorney(s) for

Sir:—Please take notice

Notice of Entry

that an
within entitled action on the
in the office of the Clerk of the County of

of which the within is a copy, was duly granted in the
day of 19 , and duly entered
on the day of 19

To

Attorney(s) for

DOYLE, DIEBOLD, BERMINGHAM, GORMAN & BROWN
Attorneys for

